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EDITOR'S NOTE

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PROCEEDINGS AND ORDERS

DATE: 012186

CASE NBR 84-1-01750 CFX
SHORT TITLE Ballam, Loy R. B.
VERSUS United States

DOCKETED: May 9 1985

Date	Proceedings and Orders
May 9 1985	Petition for writ of certiorari filed.
May 28 1985	Order extending time to file response to petition until July 12, 1985.
Jul 2 1985	DISTRIBUTED. September 30, 1985
Jul 2 1985	Brief of respondent United States in opposition filed.
Oct 7 1985	REDISTRIBUTED. October 11, 1985
Oct 15 1985	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Dec 5 1985	Supplemental brief of respondent United States filed.
Dec 11 1985	REDISTRIBUTED. January 10, 1986
Jan 13 1986	REDISTRIBUTED. January 17, 1986
Jan 21 1986	Petition GRANTED. Judgment VACATED and case REMANDED to transfer the case pursuant to 28 U.S.C. Section 1631 to the Court of Appeals for the Federal Circuit. See 28 U.S.C. Section 1295(a)(2). Opinion per curiam.

CONTINUE (

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****

PETITION FOR WRIT OF CERTIORARI

84-1750 (1)

Office-Supreme Court, U.S.
FILED
MAY 9 1985
ALEXANDER L. STEVAS,
CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

LOY REE B. MARLOWE BALLAM,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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32 pp

Question Presented for Review

Does privately owned land abutting on an artificially created navigable channel constructed by the United States on a strip of land purchased by the United States through privately owned fastlands become burdened with the federal government's dominant navigational servitude so as to be exposed to taking by erosion without payment of the compensation required under the due process clause of the Fifth Amendment of the United States Constitution?

Parties

Petitioner Loy Ree B. Marlowe Ballam was the plaintiff in the District Court for the District of South Carolina and the Appellee in the United States Court of Appeals for the Fourth Circuit. The United States of America was the defendant in the District Court for the District of South Carolina and the Appellant in the United States Court of Appeals for the Fourth Circuit. The State of South Carolina was also named as a Defendant in the original action brought by Petitioner. The District Court granted Defendant State of South Carolina's Motion to Dismiss and dismissed the State as a party Defendant to the central action. No party appealed this aspect of the District Court's decision. There have been, and are, no other parties to the case.

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Reports of Opinions

The Order of the District Court is reported at 552 F.Supp. 390 (D.S.C. 1982). The opinion of the Court of Appeals is reported at 747 F.2d 915 (4th Cir.1984). The Order of the Court of Appeals for the Fourth Circuit denying Petitioner's suggestion for rehearing and rehearing in banc has not been reported. The complete texts of these opinions are set forth in the Appendix to this Petition.

Jurisdiction

The opinion of the Court of Appeals for the Fourth Circuit reversing the District Court's judgment by a two to one majority decision was decided and entered on October 23, 1984. The Court of Appeals denied Ballam's Petition for rehearing and suggestion for rehearing in banc on March 15, 1985. The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. Section 1254(1).

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article 1, Section 8 Paragraph 3 of the United States Constitution provides that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

28 U.S.C.A. Section 1346(a)(2) provides:

> The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of . . . Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the

> United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to Section 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978.

Statement of the Case

On January 25, 1982, Plaintiff Loy Ree B. Marlowe Ballam filed a complaint in the United States District Court for the District of South Carolina against the United States and the State of South Carolina. In her complaint, Ballam alleged that the defendants had unconstitutionally taken her property without compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I Section 13 of the South Carolina Constitution. Ballam alleged that the District Court possessed jurisdiction pursuant to the Tucker Act, 28 U.S.C.A. Section 1346. The District Court subsequently granted Defendant State of South Carolina's Motion to Dismiss and dismissed the State as a party Defendant to the central action. Neither the United States nor Ballam has appealed this dismissal.

Loy Ree B. Marlow owns real estate adjacent to the governmentally created Atlantic Intracoastal Waterway with a frontage of approximately one hundred thirty-six (136) fee. By deed dated September 10, 1931, Ballam's predecessor-in-title granted to the State of South Carolina a perpetual easement to enter upon, excavate, cut away, and remove any and all of a strip of land three hundred twenty (320) feet in width and approximately seventeen hundred (1700) feet in length, for the purpose of constructing and maintaining the Atlantic Intracoastal Waterway. South Carolina subsequently deeded this easement to the United States. Ballam's property is a part of the adjoining lands that border on this 1700 foot strip.

As originally authorized, the Atlantic Intracoastal Waterway project provided for a channel eight (8) feet deep and seventy-five (75) feet wide at the bottom. Sometime around the year 1941, the United States Army Corps of Engineers enlarged the channel to a depth of twelve (12) feet and a width of ninety (90) feet at the bottom. As enlarged, the top of the Waterway in the area of Ballam's

property was approximately two hundred thirty-five (235) feet wide. This width left eighty-five (85) of the three hundred twenty (320) foot easement unused, fifty-three (53) feet of which were on Ballam's side of the Waterway. At that time, the Waterway along Ballam's property was still within the easement granted to the State and conveyed to the United States. Since the Waterway's construction, the Corps of Engineers, an agency of defendant United States, has maintained the Waterway.

Since 1941, there has been an erosion of all of the remaining fifty-three (53) feet of easement. The erosion has continued and eaten into Ballam's adjoining property. Within the last seven (7) years, Ballam's property has eroded to a depth of approximately four (4) feet on the west end and to a depth of twenty-nine (29) feet on the east end. The erosion has not become stabilized, but continues. The District Court found that the primary cause of the erosion to Ballam's property consisted of wave wash from vessels using the Atlantic Intracoastal Waterway.

In rendering judgment for Ballam, the District Court held that the erosion of Ballam's property beyond the boundary of the United States' easement constituted a taking for which Ballam is entitled to just compensation under the Fifth Amendment to the United States Constitution. The District Court further held that the parties could not have assumed that the Waterway would use more land than the entire three hundred twenty (320) feet granted by the easement. The District Court awarded Ballam Eight Thousand Eight Hundred Four ($8,804.00) Dollars in damages.

On October 23, 1984, a panel of the United States Court of Appeals for the Fourth Circuit reversed the District Court's judgment by a two to one majority decision. Writing for the majority, Judge Murnaghan held that the encroachment into Plaintiff's adjoining property beyond the confines of the initial grant did not constitute a compensable taking under the Fifth Amendment. The majority held that the federal government could expand the original taking beyond the scope originally bought and paid for by asserting that the adjacent fastland had become subject to the federal government's dominant navigational servitude.

Dissenting, Judge Ervin stated that the majority's assumption, that the original easement created "exactly the same situation or condition" that would have existed if the Waterway in Horry County had been natural and not man-made, is unacceptable and unsupportable.

Argument

Ballam submits that the Court of Appeals' decision decided an important question of federal constitutional law which has not been, but should be, settled by this Court.

Ballam submits that the majority decision of the Court of Appeals is totally inconsistent with this Court's decision in *United States v. Dickinson,* 331 U.S. 745 (1947). It is beyond dispute that an initial lawful taking cannot be expanded without additional compensation. *See United States v. Virginia Electric & Power Co.,* 365 U.S. 624 (1961). This case presents the novel issue of whether the federal government's navigational servitude attaches to fastlands adjacent to a new waterway created by the United States where none previously existed, so as to expose such property to a taking without the right to just compensation.

The erosion damage caused in part by wave wash from vessels using the government's artificial waterway and in part by natural action constitutes a taking under the Fifth Amendment of the United States Constitution. The United States has asserted that the damages to Ballam's property are noncompensable on the ground that her adjacent property became subject to the navigational servitude when the United States dug a navigable channel through the fastlands that it had acquired for that purpose. The claim of the United States and the holding of the Court of Appeals would extend the dominant navigational servitude that burdens property bordering on natural navigable channels to highland properties that had no water frontage until the United States acquired a discreetly defined adjoining strip of land and dug therein an artificial navigable waterway. This exclusive servitude, the United States asserts, prohibits riparian owners from recovering compensation

for damages done to their land by changes in the flow of an artificial stream created by direct governmental action so long as the government does not raise the level of this artificial stream above the normal (ocean) level created when the artificial waterway was first built. This assertion fails to note that in this case, until the grant of easement by Ballam's predecessor-in-title, there was no stream; there was no high water mark; Ballam's lands were not riparian nor were they burdened with any servitude.

This Court has held that the navigational servitude created by Congress's right to regulate interstate commerce does not "create [ ] a blanket exception to the Taking Clause whenever Congress exercises its Commerce Clause Authority to promote navigation." *Kaiser Aetna v. United States,* 444 U.S. 164, 172 (1979). Ballam submits that her damages have been caused by direct federal governmental action not protected by the federal government's dominant navigational servitude.

The Fifth Amendment imposes an affirmative duty on the federal government to compensate private persons for "private property. . . taken for public use. . ." *U.S. Const. amend. V.* In determining whether a government action constitutes a compensable taking, this Court has held that the federal government need not compensate "indirect and consequential" damages. *United States v. General Motors Corp.,* 323 U.S. 373, 379-80 (1945); *Sanguinetti v. United States,* 264 U.S. 146, 149-50 (1924). Although this Court, has never precisely defined "consequential" damages, it has provided guidance in the form of requiring that all underlying damages which are the direct result of government action are compensable. *United States v. Causby,* 328 U.S. 256, 265-66 (1946) (damages are not consequential where they are "the product of a direct invasion of respondent's domain").

In *United States v. Dickinson,* 331 U.S. 745 (1947), this Court held that erosion damage is compensable. In that case, Plaintiffs brought an action under the Tucker Act to recover the value of property which they claimed had been taken by the federal government. In order to improve a river's navigability, Congress had authorized the construction of a dam which had raised the river level. The raising

of the river level had permanently flooded land belonging to respondents and further eroded the land which formed the new bank of the pool. Over the government's claim that the erosion was consequential, this Court affirmed the damage award. This Court held that property "is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in the course of time". *Id.* at 748. "[P]ayment need only be made for what is taken, but for all that the Government takes it must pay." *Id.* at 750. "If the resulting erosion which, as a practical matter constituted part of the taking was in fact preventable by prudent measures, the cost of that prevention is a proper basis for determining the damage. . . ." *Id.* at 751. The trial court's opinion cites *Dickinson* as controlling. The Court of Appeals does not cite it at all.

This Court has previously held that the dominant navigational servitude possessed by the United States to aid interstate commerce relieves the United States from its Fifth Amendment obligation to compensate a landowner for erosion damage within the banks of a natural stream to the ordinary high water mark. *United States v. Virginia Electric and Power Co.,* 365 U.S. 624 (1964); *United States v. Willow River Power Co.,* 324 U.S. 499, 509-10 (1945). This navigational servitude does not extend to damages caused beyond the natural high water mark and the government must compensate for any taking beyond that point. *See United States v. Willow River Power Co.,* 324 U.S. at 509-10. In *Dickinson,* this Court held that the Fifth Amendment requires the payment of compensation when the natural water level is raised by direct governmental action, such as the building of a dam. This case raises the issue of whether the construction of another improvement, an artificial channel dug by the government through fastland which creates a new artificial water level where none previously existed, falls within the rule enunciated by this Court in *Dickinson.*

This Court has clearly held that the government may be held liable for damages caused by a "taking" of adjacent fastlands in order to create a new artificial high water mark. *United States v.*

Kansas City Life Insurance Co., 339 U.S. 799 (1950). See also *United States v. Virginia Electric and Power Co.*, 365 U.S. 624 (1961); *United States v. Willow River Power Co.*, 324 U.S. 499, 509-10 (1945).

Two recent decisions of this Court have specifically held that the federal government's navigational servitude does not confer on the federal government the exclusive right to take what it pleases above a natural ordinary high water mark without compensation. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court emphasized that the navigational servitude does not create a blanket exception to the Fifth Amendment whenever Congress exercises its commerce clause authority to promote navigation. *Id.* at 172. "The navigational servitude is an expression of the notion that the determination of whether a taking has occurred must take into consideration the important public interest in the flow of interstate waters that in their *natural condition* are in fact capable of supporting public navigation." *Id.* at 174 (emphasis added).

> [W]hen the government acquires fastlands to improve navigation, it is not required under the Eminent Domain Clause to compensate land owners for certain elements of damage attributable to riparian location . . . but none of these cases ever doubted that when the Government wished to acquire fastlands, it was required by the Eminent Domain Clause of the Fifth Amendment to condemn and pay fair value for that interest.

Id. at 177. In *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (1979), this Court distinguished between the nature of governmental rights in situations involving natural streams and those involving artificially built waterways. In that case, this Court distinguished "canals built on private property. . . in such a manner that they ultimately join with other navigable waterways" from "artificial navigable waterway[s created] in part by means of diversion or destruction of a pre-existing natural navigable waterway." *Id.* This Court held that the government does not possess the right to require public use of the former purely artificial waterways while the government might be able to impose such a requirement on an artificial stream which destroyed the navigability of surrounding natural waterways. *Id.* at 208-09.

The United States Army Corps of Engineers itself clearly and explicitly has recognized the unique obligations with respect to artificial waterways imposed on it by this Court's decision in *United States v. Dickinson.* The Corps' internal memorandum of 2 February, 1979 shows that the Corps, an agency of Respondent United States, differentiated between its obligation to protect land bordering artificially created waterways and its more limited responsibility to protect land bordering natural streams. As to the former obligation, the Corps "restated" that division policy required that:

> When erosion occurs and exceeds the limits of the acquired rights-of-way, there is an obligation to protect the adjacent properties. Protection may be achieved by either revetment work or through acquisition of additional property rights. The economics of the situation will determine the course to be followed and may involve a combination. The government may assume the cost of revetment, but in those instances where the sponsor is required to furnish land interest, the sponsor will be informed of the additional land requirements.

Plaintiff's Exhibit 20.

Petitioner submits that this case raises two important federal questions that this Court should address. First, this Court has not determined whether the taking clause of the Fifth Amendment to the United States Constitution imposes an obligation on the United States Government to compensate adjoining landowners for damage to their property when a governmentally created artificial waterway exceeds the boundary of a specifically defined easement acquired to construct the project. Second, this case raises the issue of whether damages directly caused by such a government project are "consequential" so as to excuse the federal government from paying the compensation required by the Fifth Amendment.

Conclusion

For the foregoing reasons, the Petitioner urges that this Honorable Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Opinion and Order of the District Court

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

LOY REE B. MARLOWE BALLAM,
Plaintiff,

v. Civil Action No.
82-127-2

UNITED STATES OF AMERICA,
Defendant.

Judgment

On this the 1st day of December, 1982, the Court having coincident herewith made its findings of fact and conclusions of law herein, and having found and concluded that plaintiff, Loy Ree B. Ballam, is entitled to judgment against the defendant, United States of America, in the sum of Eight Thousand Eight Hundred and Four ($8,804) Dollars, together with interest thereon from the date of this judgment at the current rate per annum allowable in judgments against the United States, it is, therefore,

ORDERED, ADJUDGED and DECREED by the Court that the plaintiff, Loy Ree B. Ballam, do have and recover of and from the defendant, United States of America, the sum of Eight Thousand Eight Hundred and Four ($8,804) Dollars, together with interest thereon from the date of this judgment at the current rate per annum allowable in judgments against the United States.

It is further ORDERED, ADJUDGED and DECREED that all injunctive relief requested by the plaintiff is DENIED.

Entered this the 1st day of December, 1982.

Adrian A. Spears
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

LOY REE B. MARLOWE BALLAM,

Plaintiff,

v. Civil Action No.
82-127-2

UNITED STATES OF AMERICA,

Defendant.

Findings of Fact and Conclusions of Law

On this the 1st day of December, 1982, the Court, having heard and duly considered the evidence and the arguments of counsel finds and concludes as follows:

Findings Of Facts

(1) Plaintiff, Loy Ree Ballam, a resident of the State of South Carolina, owns real estate adjacent to the Atlantic Intercoastal Waterway (AIWW), with a frontage thereon of approximately one hundred thirty-six (136) feet.

(2) The AIWW was constructed by the defendant, United States of America, during the mid 1930's and early 1940's. The project authorization provided that the local interests would furnish free of cost to the defendant, rights-of-way of sufficient width for a canal prism and for the disposal of spoil.

(3) Pursuant to the conditions of the project authorization, the State of South Carolina obtained the requested rights-of-way and easements, and conveyed them to the defendant.

(4) By deed, dated September 10, 1931, the plaintiff's predecessor in title, granted to the State of South Carolina a perpetual easement

to enter upon, excavate, cut away, and remove any and all of a strip of land three hundred twenty (320) feet in width and approximately seventeen hundred (1700) feet in length, for the purpose of the construction and maintenance of the AIWW. Plaintiff's property is a part of the original 1700 feet granted to the government by the plaintiff's predecessor in title.

(5) The deed from plaintiff's predecessor in title to the State of South Carolina contained the following release:

> The grantor does hereby waive and release the grantee, its successors and assigns and its or their officers, agents, servants, and contractors from any and all claims for damages which may result from the construction and maintenance of the waterway and the deposit of spoil or other matter as hereinabove stated; this waiver and release of damages being intended as a continuing covenant which shall run with the land and be binding upon the grantor and on his, her, its heirs, successors and assigns.

(6) The easement so granted to the State of South Carolina was included in the deed from the State of South Carolina to the defendant.

(7) Since the construction of the AIWW, it has been maintained by defendant, acting through the Corps of Engineers, Department of the Army, an agency of the defendant.

(8) As a part of the maintenance of the AIWW, the defendant has dredged the channel of the waterway every 2 or 3 years. Dredging consists of removing the shoals (sandbanks or sandbars) caused by bank soil flowing into the waterway, and removing any trees, limbs, or similar debris that may have entered the AIWW. This dredging is done in order to aid navigation in the waterway.

(9) The project authorization provided for a channel eight (8) feet deep and seventy-five (75) feet wide at the bottom. Around the year 1941 the channel was enlarged to be twelve (12) feet deep and ninety (90) feet wide. As enlarged, the top of the AIWW, in the area of plaintiff's property, was approximately 235 feet in width, leaving some eighty-five (85) feet of the 320 foot easement unused, fifty-three (53) feet of which was on the Ballam side of the AIWW. Thus,

at that time, the AIWW along plaintiff's property was still within the easement granted to the defendant.

(10) Subsequently, there was erosion of the remaining fifty-three (53) feet of the easement, and ultimately the erosion extended into plaintiff's adjoining property. Within the last seven years, plaintiff's property has been eroded by approximately four (4) feet on the West and twenty-nine (29) feet on the East (a total of 2000 square feet or .046 acre), and the erosion has not become stabilized.

(11) The primary cause of the erosion to the plaintiff's property is wave wash from vessels using the AIWW. The sandy soil on plaintiff's property is such that the erosion is a continuous process and unless remedial measures are taken, her property will continue to erode in the future.

Conclusions of Law

(1) This Court has jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1346(a)(2), since damages sought do not exceed $10,000.

(2) The erosion of plaintiff's property past the boundary of the government's easement, constitutes a taking for which plaintiff is entitled to just compensation. This is not a situation where there is navigable servitude because the rights of the government are derived from the easements granted and not from its sovereign right to aid navigation on a navigable waterway. But even if navigable servitude is involved, the plaintiff could still recover because of the erosion to her fast lands, which are well above high tide. *United States v. Virginia Electric and Power Co.,* 365 U.S. 624, 627, 81 S.Ct. 784, 787, 5 L.Ed.2d 838 (1961); *United States v. Willow Power Co.,* 324 U.S. 499, 509, 65 S.Ct. 761, 767, 89 L.Ed. 1101 (1945). Nor is the erosion a consequential damage for which no compensation can be had. *United States v. Dickinson,* 331 U.S. 745, 750, 67 S.Ct. 1382, 1385, 91 L.Ed. 1789 (1947). "The mere fact that all the United States needs and physically appropriates is the land up to the new level of the river, does not determine what in nature it has taken. If the Government cannot take the acreage it wants without also washing away more, that more becomes part of the taking." *Id.*

(3) The release executed by plaintiff's predecessor in title is not sufficiently broad to be binding upon the plaintiff under the facts of this case. The release was contained in the deed which granted an easement to the government, and applies only to that easement. See *Hilton v. Duke Power Company,* 254 F.2d 118, 123 (4th Cir. 1958). At the time of the granting of the easement it was not contemplated that the full 320 feet would be used for the channel, because the project authorization provided that the ultimate dimensions of the channel would be 12 feet deep and 90 feet wide at the bottom. Thus it is reasonable to assume that the waterway would not use the entire 320 feet granted in the easement. (The government acknowledges the fact that in high bluff areas a larger easement was taken). Additionally, it should be noted that plaintiff's claim is based on a taking of her land — not just for an injury thereto.

(4) The statute of limitations does not bar complete recovery by plaintiff because the erosion constitutes a continuous taking, *United States v. Dickinson,* 331 U.S. 745, 749, 67 S.Ct. 1382, 1385, 91 L.Ed. 1789 (1947); however, the plaintiff's recovery is limited to damages for erosion occurring within six years of the filing of this suit. *Hilton v. Duke Power Co., supra,* at 122.

(5) Plaintiff, Loy Ree Ballam, is entitled to damages in the total amount of $8,804.00, caused by the taking of her land, and the cost of protecting the land from future erosion. Testimony as to the value of plaintiff's property ranged from $7,000 per acre to $50,000 per acre, neither of which valuation was, in the opinion of the Court, realistic. Rather, the Court believes that a valuation of $14,000 per acre is more reasonable under the evidence, and, therefore finds the total value of plaintiff's property to be $65,800. (4.7 acres x $14,000).

Since, under the evidence, plaintiff lost, through erosion, .046 of an acre, the value of the property taken was $644. ($14,000 x .046).

With respect to the cost of protecting the property from future erosion, the testimony ranged from $50 to $200 per running foot for 136 feet. (One witness said the cost could run as high as $300). In addition, there was testimony that the land would have to be sloped prior to the installation of a revetment. Again, neither of the

extremes in the testimony can be considered reasonable. (It is interesting to note, however, that the $200 figure was offered as a cost to the government, by a representative of the Army Corps of Engineers). A more realistic amount under the evidence would be $60 per running foot, or a total, for 136 feet, of $8,160. In this connection, the Court finds that it would have been sound economy in view of the character and nature of the property to have made that expenditure. *United States v. Dickinson,* 152 F.2d 865, 870 (4th Cir. 1946), aff'd 331 U.S. 745, 751, 67 S.Ct. 1382, 1386, 91 L.Ed. 1789 (1947).

(6) Plaintiff is entitled to judgment in the amount of $8,804.00.

(7) Plaintiff is not entitled to any injunctive relief under the Tucker Act, 28 U.S.C. § 1346(a)(2). See *Lee v. Thornton,* 420 U.S. 139, 140, 95 S.Ct. 853, 854, 43 L.Ed.2d 85 (1975).

Entered this the 1st day of December, 1982.

Adrian A. Spears
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1120

Loy Ree B. Marlowe Ballam,

Appellee,

v.

United States of America,

Appellant,

and

State of South Carolina,

Defendant.

Appeal from the United States District Court for the District of South Carolina, at Florence. Adrian S. Spears, District Judge. (C/A 82-0127)

Argued: March 6, 1984 Decided: October 23, 1984

Before PHILLIPS, MURNAGHAN, and ERVIN, *Circuit Judges.*

Maria A. Iizuka, Dept. of Justice (F. Henry Habicht, II, Assistant Attorney General; Henry Dargan McMaster, United States Attorney, Glen E. Craig, Assistant United States Attorney; Robert L. Klarquist, Dept. of Justice on brief) for Appellant; Augustine T. Smythe (Morris A. Ellison, Buist, Moore, Smythe & McGee; H.F. Bell on Brief) for Appellee.

MURNAGHAN, Circuit Judge:

The appellee, Loy Ree B. Marlowe Ballam, brought suit in the United States District Court for the District of South Carolina claiming erosion damage to her real property caused by the Atlantic Intracoastal Waterway (AIWW). Because the claim was for less than $10,000, the district court had jurisdiction. *See* 28 U.S.C. § 1346(a)(2). The district court awarded Ballam $8,804 in damages.

The United States raises two grounds for reversal. One, it argues that the suit is barred by a release given by Ballam's predecessor-in-title, her father. Two, it contends that the erosion is not compensable because Ballam's land was, and is, burdened by the government's dominant navigational servitude, precluding a finding that there was a taking by the government.

I.

In 1931, the United States authorized the improvement and extension of the Atlantic Intracoastal Waterway from Cape Fear River, North Carolina, to St. Johns River, Florida. *See* Act of July 3, 1930, ch. 847, 46 Stat. 918, 924. The issues here derive from events occurring in a segment of the AIWW in Horry County, South Carolina. The act provided, *inter alia,* that local interests, in the present case the State of South Carolina, would furnish, free of cost to the United States, rights of way of sufficient width for a canal prism and the disposal of soil therefrom. The predecessor-in-title to Ballam (with his wife renouncing dower), by instrument dated September 10, 1931, conveyed to South Caroina for one dollar a perpetual easement, a covenant running with the land, over a 320 foot wide strip running 1700 feet for the construction and maintenance of the waterway. The deed of Ballam's predecessor recognized explicitly that the purpose for which it was obtained was to facilitate construction of a section of the AIWW. It further provided that the channel created for the waterway would be maintained as "a part of the navigable waters of the United States."

South Carolina, in obtaining the grant from Ballam's

predecessor, secured inclusion in its terms of a release from all claims for damages from construction and maintenance of the AIWW. The release also covered claims for damages relating to deposit of soil.

South Carolina, in turn, conveyed the easement to the United States. The United States Army Corps of Engineers proceeded to construct the extension of the AIWW. The initial dimensions of the waterway were 8 feet deep with a channel 75 feet wide.[1]

In 1941 the dimensions of the AIWW in the Horry County area were increased to a depth of 12 feet and a width of 90 feet. Thereupon, 85 feet of the easement granted by Ballam's predecessor remained above water, 53 feet of which were on the side of the waterway where Ballam's retained land is located.[2]

Thereafter, erosion, found by the district judge to have been created by the wave wash of passing vessels traversing the AIWW, ate away the 53 feet of the easement on the side occupied by Ballam and intruded on her property not subject to the easement to a distance of 4 feet on the west and 29 feet on the east, namely, 2,000 square feet of .046 of an acre.

[1]/The deed of Ballam's predecessor stated that the waterway would be constructed in accordance with the project report set forth in H.R. Doc. No. 41, 71st Cong., 1st Sess. (1929) *(Report)* and adopted in the Act of July 3, 1930, ch. 847, 46 Stat. 918, 924. The report recommended that the intracoastal waterway from Cape Fear River, North Carolina, to Charleston, South Carolina, should have a depth of 12 feet at mean low water and a bottom width of 90 feet, with the understanding that the canal prism should initially be excavated for a depth of 10 feet at mean low tide and a bottom width of 75 feet. *Report* at 60.

[2]/Plaintiff only owns part of the lands which touch upon the easement granted by her predecessor-in-title.

II.

The deed from Ballam's predecessor which granted an easement for the AIWW contained the following release:

> The grantor does hereby waive and release the grantee, its successors and assigns and its or their officers, agents servants, and contractors from any and all claims for damages which may result from the *construction and maintenance of the waterway and the deposit of spoil* or other matter as hereinbefore stated. This waiver and release of damages being intended as a continuing covenant which shall run with the land and be binding upon the grantor and on his. . . heirs, successors and assigns.

(Emphasis added). The government claims that the release bars the present suit. The district court ruled that the release only applied to the easement, not to the retained land of the grantor and his successors which was unencumbered by the easement.

In *Hilton v. Duke Power Co.,* 254 F.2d 118 (4th Cir. 1958), the court interpreted a release signed by the grantors of an easement. The court said:

> It is a general rule, well established, that "the construction of the release as to the actual intent of the parties presents a question of fact to be determined from the surrounding conditions and circumstances, construed with reference to the amount of consideration paid and the language of the release itself." 45 Am.Jur., "Release," Sec. 28, p. 692.

Id. at 124. The district court found that at the time the easement was granted it was reasonable to assume that the waterway probably would not extend over the entire 320 feet granted in the easement. Thus, the parties only intended that the release apply to suits arising from activities on the easement itself.

Since the intent of the parties is a question of fact and the record contains evidence supportive of the conclusion reached, the district court's finding is not clearly erroneous. Furthermore, a simple reading of the language of the release strongly suggests that the waiver of claims for construction and maintenance damages does

not here apply. Erosion through wave wash is neither construction nor maintenance. Rather, it is destructive and creates a need for maintenance.

III.

Were, as is the case with other sections of the AIWW, the Horry County portion here involved a natural body of water,[3] it would clearly be a navigable body of water[4] subject to the dominant navigational servitude of the United States.[5] In that case, the erosion here complained of would not be compensable by the United States. *See Pitman v. United States,* 457 F.2d 975 (Ct. Cl. 1972).

The United States' plenary admiralty jurisdiction does extend to man-made bodies of water which are navigable. *Ex parte Boyer,* 109 U.S. 629 (1884). However, the fact that a man-made stream is "navigable" does not, in and of itself, mean that the United States'

[3]/Parts of the AIWW, including portions in existence when the grant by Ballam's predecessor dated September 10, 1931 was made, traverse natural bodies of water. However, the portion of the AIWW which touches upon the plaintiff's land is wholly man-made. Prior to construction of the AIWW, the plaintiff's land was wholly land-locked, part of a plain, generally 25 to 50 feet above sea level. *See* H.R. Doc. No. 41, 71st Cong., 1st Sess. 11 (1929).

[4]/At common law, "navigable waters" were defined as those waters subject to the ebb and flow of the tide. The Supreme Court abandoned the common law rule in 1871 and substituted a navigable-in-fact test for determining if waters are "navigable." *See The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1871). The AIWW is both subject to the ebb and flow of the tide and navigable-in-fact.

[5]/The navigational servitude describes the power whereby the United States need not compensate private owners for damage to their property caused by improvements to navigable streams, which aid navigation and do not raise the level of the stream. *See United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.,* 312 U.S. 592, 596-99 (1941); *see also* Fitts and Marquis, *Liability of the Federal Government and Its Agents for Injuries to Real Property Resulting from River Improvements,* 16 Tenn. L. Rev. 801 (1941).

navigational servitude attaches to it. In *Kaiser Aetna v. United States,* 444 U.S. 164 (1979), the Court held that, although a privately owned pond which was connected to a navigable bay by a private, manmade improvement was "navigable water," the government's attempt to create a public right of access to the pond was a taking requiring compensation. Similarly, in *Vaughn v. Vermillion Corp.,* 444 U.S. 206 (1979), the Court held that the public had no right of use of private canals connected to navigable waterways.

Nevertheless, in the present case, public right of access and use were fully contemplated and altogether evident from the very outset, prior to the acquisition of easements, in particular prior to the conveyance of September 10, 1931 by Ballam's predecessor. He knew, when he executed and delivered the deed, that public access to the AIWW extension to be constructed in Horry County was part and parcel of the contemplated project. The waterway extension was unmistakably to be built by the United States with public funds. Ballam's predecessor either was compensated for his giving an easement to build a waterway to be generally available for use by the boating public, or he determined that the benefit to his remaining land merited the conveyance for the nominal sum of $1.00. Ballam's predecessor acknowledged in his grant that the waterway would be part of "the navigable waters of the United States."

Ballam's predecessor and others similarly situated thus appreciated the intent to create on the properties for which easements were granted exactly the same situation or condition as already existed in extant situations of properties adjoining naturally created segments of the AIWW. As a matter of intent, derived from the four corners of the instrument, the parties to the easement grant and to the transfer thereof contemplated that the situation would be the same after the AIWW had been extended as though it had always existed as a product of natural forces. Upon these facts we hold that the AIWW, even as constructed in Horry County, had from the outset of its existence the attributes of a natural, publicly navigable waterway subject to the dominant navigational servitude of the United States.

The Fifth Amendment to the Constitution requires that the United States compensate persons when it takes their property. The government, nevertheless, need not pay compensation for damage to land that would have occured in the absence of government improvement of a waterway. In *Sanguinetti v. United States,* 264 U.S. 146 (1924), the Court held that the government was not liable for flooding caused by a canal because the land would have flooded in its natural state. In *Loesch v. United States,* 645 F.2d 905 (Ct. Cl. 1981), *cert. denied,* 454 U.S. 1099 (1981), it was held that the government was not liable for erosion caused by flooding of the Ohio River because the government's dams did not increase the natural frequency, duration or peaks of floods.

The waterway in the present case was wholly constructed by the United States. However, the grant of Ballam's predecessor estops Ballam from claiming the waterway is artificial so long as the government has done nothing to alter the waterway in a fashion not contemplated at the time the plaintiff's predecessor granted the easement. The waterway has never been expanded by the government beyond the scope originally contemplated by the report referred to in the deed from Ballam's predecessor. The purpose was to create a navigable waterway indistinguishable from one which came about through application of the forces of nature. Thus, we treat the waterway in Horry County as if it were a natural river.

There can be no liability on the part of the United States for erosion damage unless there is a showing that the United States directly and proximately caused the damage. *See Loesch v. United States,* 645 F.2d 905 (Ct. Cl. 1981), *cert. denied,* 454 U.S. 1099 (1981). The erosion damage in the present case was caused by wave wash from passing ships, not the actions of the United States.[6] Thus, the district

[6]/Indeed, apart from other applicable provisions of the grant from Ballam's predecessor, on the basis of the dominant navigational servitude alone, any other damage that may have been caused by direct, government action to the AIWW to aid navigation but did not increase the level of the stream (*e.g.,* dredging) is also noncompensable. *See Pitman v. United States,* 457 F.2d 975 (Ct. Cl. 1972).

court should have entered judgment in favor of the United States.

REVERSED AND REMANDED FOR ENTRY OF JUDGEMENT IN FAVOR OF THE UNITED STATES OF AMERICA.

ERVIN, Circuit Judge, dissenting:

The majority's conclusion hinges on the assumption that the grant of the original easement created "exactly the same situation or condition" that would have existed if the waterway in Horry County had been natural and not man-made. If one accepts this premise, then it is clear that the section of the waterway that crossed Mrs. Ballam's land was subject to the dominant navigational servitude of the United States and any erosion that occured beyond the boundaries of the easement was noncompensable.

I remain unconvinced that this premise is valid. The deed expressly limited the easement in the initial grant to a strip of land 320 feet wide and 1700 feet long. Within these precise boundaries, Mrs. Ballam's predecessor authorized the United States, through the State of South Carolina, to construct a canal linking two stretches of natural waterway. The easement granted no more and no less than the exact piece of land described in the deed. The document states only that the grantor

> does grant, bargain, sell and release unto the said State of South Carolina, its successors and assigns, the perpetual right and easement to enter upon, excavate, cut away, and remove any and all of the hereinbefore described tract numbered 37-A as may be required at any time for construction and maintenance of the said inland waterway, or any enlargement thereof, and to maintain the portion so excavated and the channel thereby created as a part of the navigable waters of the United States; and the further perpetual right and easement to enter upon, occupy and use any portion of said tract numbered 37 not so cut away and converted into public navigable water as

> aforesaid, for the deposit of dredged material and for such other purposes as may be needful in the construction, maintenance, and improvement of the said inland waterway; reserving, however, to the grantor, his, her, its heirs, successors and assigns, all such rights and privileges in said tract of land as may be used and enjoyed without interfering with or abridging the rights and easements hereby conveyed.

J.A. at 14. Had Mrs. Ballam's predecessor wished to grant the government land for the waterway *and* such additional land as would be needed or consumed during construction and use of the canal, that understanding could easily have been included in the deed.

In my view the majority has read far more into the words "created as a part of the navigable waters of the United States" than is warranted by a careful reading of the grant limited to the four corners of the document. The grant makes clear that the government will not only construct but maintain the waterway: "the said grantor does grant [the stated tract] as may be required for *construction* and *maintenance* of the said inland waterway." J.A. at 14 (emphasis added). It is unclear to me why a servitude protecting the government from liability for its failure to maintain the sides of the canal and protect against erosion should now be read into the deed.

A taking by the government is permissible provided there is reasonable compensation to the owner. *See United States v. Causby,* 328 U.S. 256 (1946); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). An initial lawful taking, however, cannot be expanded without additional compensation. *See United States v. Virginia Electric & Power Co.,* 365 U.S. 624 (1961). Were the Atlantic Intercoastal Waterway a highway, the use of which had caused the destruction of adjoining land, there is no question that the government would be required to compensate for the adjoining land as well as the land on which the highway sat. The same principles apply here. I see no just reason why Mrs. Ballam should suffer potentially the loss of her entire property without compensation simply because the government failed to construct a waterway in a man-

ner that ensured the terms of the easement grant would not be violated.

The majority, of course, goes on to argue that "wave wash," and not the government, was responsible for the erosion. Thus, even if a navigational servitude did not exist, in their view there was insufficient causation to establish a compensable taking under the fifth amendment. The problem with this argument, however, is that it ignores the obvious; but for the government the waterway would not have crossed Mrs. Ballam's land. I am hardpressed to determine who or what, other than the government, is responsible for the damage. To draw a distinction between "wave wash" and the government amounts to a distinction without real meaning.

Because the initial easement makes no provisions for the use of land beyond the specific boundaries set out in the deed, and because the government's actions resulted in the taking of fast[1] land beyond those boundaries, I would affirm the decision of the district court.

[1]/Fast land is defined as: Mainland; esp: land that is high and dry near water: upland. *Webster's Third New International Dictionary* 827 (1976). There was no inland waterway across Mrs. Ballam's land prior to the execution of the easement and the construction carried out by the government. The majority proceeds on the assumption that the execution of an easement and the subsequent building of a portion of the inland waterway across fast land where there was no natural waterway originally vests in the United States a right of dominant navigational servitude identical to that existing where there was a natural navigable waterway in the beginning. I do not believe that either the law or the easement in question produces such a result nor did the signature parties to the easement so intend.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1120

Loy Ree B. Marlowe Ballam,

Appellee,

versus

United States of America,

Appellant,

and

State of South Carolina,

Defendant.

Appeal from the United States District Court for the District of South Carolina, at Florence. Adrian S. Spears, District Judge.

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Phillips. Judge Ervin dissents.

For the Court,

John M. Greacen

Clerk

OPPOSITION

BRIEF

Office - Supreme Court, U.S.
FILED
JUL 2 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1750

In the Supreme Court of the United States

OCTOBER TERM, 1984

LOY REE B. MARLOWE BALLAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States is liable in money damages for minor erosion of a riparian owner's land located above the mean high water mark and adjacent to a man-made waterway, where the damage is attributable to wave wash from vessels using the waterway.

Page

Constitution and statute:

U.S. Const. Amend. V 6

Rivers and Harbors Act of 1927, ch. 47, § 4, 44 Stat. 1018 1

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-16a) is reported at 747 F.2d 915. The opinion of the district court (Pet. App. 1a-6a) is reported at 552 F. Supp. 390.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1984. A petition for rehearing was denied on March 15, 1985. The petition for a writ of certiorari was filed on May 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Atlantic Intracoastal Waterway (AIWW) extends for 475 miles from Cape Fear River, North Carolina, to Saint Johns River, Florida. Authorized by Section 4 of the Rivers and Harbors Act of 1927, ch. 47, 44 Stat. 1018, the AIWW follows natural waterways through low marsh lands

between coastal islands and the mainland. The waterway was constructed to improve both commercial and recreational traffic. Localities that were to benefit from the waterway were required to furnish all necessary rights-of-way and to construct and maintain all necessary bridges.

In 1959, petitioner acquired land located adjacent to the AIWW. In 1931, petitioner's father, her predecessor-in-title, granted an easement to the State of South Carolina over a tract 320 feet wide and 1,700 feet long in conjunction with the building of the AIWW. The easement was conveyed to the State for one dollar. The State then transferred this property interest to the United States by deed. The deed contained a release clause that provided as follows (Pet. App. 3a):

> The grantor does hereby waive and release the grantee, its successors and assigns and its or their officers, agents, servants, and contractors from any and all claims for damages which may result from construction and maintenance of the waterway and the deposit of spoil or other matter as hereinabove stated; this waiver and release of damages being intended as a continuing covenant which shall run with the land and be binding upon the grantor and on his, her, its heirs, successors and assigns.

The original channel was 8 feet deep and 75 feet wide at the bottom (Pet. App. 3a). In 1941, the channel was enlarged to a depth of 12 feet and a width of 90 feet (*ibid.*). At the time of the enlargement, 85 feet of the 320-foot easement remained unused (*ibid.*). Subsequently, erosion, which the district court found was primarily attributable to "wave wash from vessels using the AIWW" (*id.* at 4a), extended approximately .046 acre (2,000 square feet)

beyond the original easement into petitioner's adjoining property (*ibid.*).[1]

2. In 1982, petitioner brought suit in the United States District Court for the District of South Carolina against the United States and the State of South Carolina. She sought money damages, asserting that the maintenance and use of the waterway had caused the erosion. Petitioner also asked the district court to order the Corps of Engineers to take remedial measures on her property to prevent further erosion. On motion, the State was dismissed as a party defendant. The district court also dismissed the cross-claim filed by the United States against the State, because it found no intent in the deed of conveyance from the State to indemnify the United States.

Rejecting the government's defense that petitioner's claim was barred by the statute of limitations as well as by the release language of the deed (Pet. App. 5a), the district court held that the erosion was not "a consequential damage for which no compensation can be had" (*id.* at 4a). The district court also held that the government's navigational servitude was not at issue, "because the rights of the government are derived from the easements granted" (*ibid.*). Even if the servitude were applicable, the court continued, petitioner would still be entitled to damages because the erosion had occurred on her fast lands (*ibid.*). The district court awarded petitioner $8,804.00 in damages. This figure included $644.00 for land already lost, based on

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[1]The district court, while stating (Pet. App. 4a) that the "primary" cause of the erosion was wave wash from vessels using the AIWW, did not identify any other cause for the erosion. Petitioner herself asserts (Pet. 5) that the erosion was caused in part by wave wash and in part by "natural action." Petitioner does not identify any governmental action responsible for the erosion, in whole or in part. See pages 6-7, *infra*.

.046 of an acre valued at $14,000.00 per acre, and $8,160.00 to protect the property from future erosion (*id.* at 5a-6a).

3. A divided panel of the court of appeals reversed (Pet. App. 7a-16a). While rejecting the government's argument that the release in the document conveying an easement to the State and subsequently to the United States precluded petitioner from suing the United States (*id.* at 10a), the court held that the United States was not liable for the damage to petitioner's property (*id.* at 13a).

The court of appeals, although acknowledging that the government's navigational servitude does not automatically attach to a navigable man-made body of water (Pet. App. 11a-12a), also noted that "[petitioner's] predecessor acknowledged in his grant that the waterway would be part of 'the navigable waters of the United States' " (*id.* at 12a), and that a "public right of access and use were fully contemplated * * * from the very outset" (*ibid.*). Accordingly, the court held that the "parties to the easement grant and to the transfer thereof contemplated that the situation would be the same after the AIWW had been extended as though it had always existed as a product of natural forces" and that the AIWW "had from the outset of its existence the attributes of a natural, publicly navigable waterway subject to the dominant navigational servitude of the United States" (*ibid.*). The court of appeals further held that there was no showing that the United States had directly and proximately caused the erosion damage to petitioner's property; instead, the damage "was caused by wave wash from passing ships" (*id.* at 13a).[2]

---

[2]The dissent would have held the government liable because the deed did no more than grant the United States an easement over a discrete portion of land (Pet. App. 15a). In the dissent's view, the government had failed to "maintain the sides of the canal and protect against erosion" (*ibid.*).

ARGUMENT

The court of appeals correctly held that the United States is not liable in money damages for erosion on petitioner's property. The decision does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

Petitioner, in urging review by this Court, misstates the holding of the court of appeals. The court of appeals did not hold that "the federal government could expand the original taking beyond the scope originally bought and paid for by asserting that the adjacent fastland had become subject to the federal government's dominant navigational servitude" (Pet. 4). Instead, the court of appeals held that petitioner's predecessor-in-title had understood that the man-made portion of the AIWW would be identical for all purposes to those parts of the waterway that had been naturally created (Pet. App. 12a). Therefore, the part of the waterway located near petitioner's property "had from the outset of its existence the attributes of a natural, publicly navigable waterway subject to the dominant navigational servitude of the United States" (*ibid.*). This fact-bound determination does not warrant further review.

Petitioner's claims are also based on a misunderstanding of the applicable law. The navigational servitude, a power derived from the Commerce Clause, recognizes the overriding federal interest in the navigable waters of the United States. Utilizing this authority, the government may "appropriate without compensation." *United States* v. *Virginia Electric Power Co.*, 365 U.S. 624, 627 (1961). See also *Kaiser Aetna* v. *United States*, 444 U.S. 164, 177 (1979). Petitioner's reliance on *Kaiser Aetna* and its companion case, *Vaughn* v. *Vermillion Corp.*, 444 U.S. 206 (1979), to support her argument on the inapplicability of the navigational servitude, is misplaced. In both *Kaiser Aetna* and *Vermillion*, the issue involved public access to waterways

created by private efforts. See *Kaiser Aetna,* 444 U.S. at 176, and *Vermillion,* 444 U.S. at 208. Those two cases dealt with "investment-backed expectations." *United States* v. *Certain Parcels of Land,* 666 F.2d 1236,1240 n.7 (9th Cir. 1982).

Petitioner does not deny that the AIWW was constructed by the United States with public funds (Pet. App. 2a, 12a). There were, therefore, no investment-backed expectations on the part of her predecessor. Indeed, as the court of appeals found, "[petitioner's] predecessor either was compensated for his giving an easement to build a waterway to be generally available for use by the boating public, or he determined that the benefit to his remaining land merited the conveyance for the nominal sum of $1.00" (*id.* at 12a).[3]

Apart from the fact that the portion of the AIWW flowing by petitioner's property "had from the outset of its existence the attributes of a natural, publicly navigable waterway subject to the dominant navigational servitude of the United States" (Pet. App. 12a), the applicable law precludes any recovery by petitioner because any damages were indirect and consequential and did not result from any direct action by the government. Petitioner does not dispute that wave wash was the primary cause of the erosion. She nevertheless asserts, without citing any authority, that such damage is a compensable taking under the Fifth Amendment (Pet. 5). Unlike *United States* v. *Dickinson,* 331 U.S. 745 (1947), on which petitioner relies (Pet. 5), where the government raised the level of the Kanawha River in West Virginia in successive stages in connection with a dam project, thereby flooding the plaintiff's property, the government here took no action raising the water level above the

[3]"If governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty." *United States* v. *Sponenbarger,* 308 U.S. 256, 266-267 (1939).

mean high water mark (Pet. App. 13a).[4] The damage in this case is precisely the sort of damage found noncompensable in *Loesch* v. *United States,* 645 F.2d 905, 913-914 (Ct. Cl.), cert. denied, 454 U.S. 1099 (1981). There, the court held that " '[i]f the impounded water were wide enough for waves to build up, and if the land were easily erodible, it would be up to the owner to exact compensation for the added exposure or else to protect himself by riprapping or other engineering measures * * *.' " *Id.* at 913 n.7 (citation omitted).[5]

In sum, the government is not liable for "consequential damages resulting from the exercise of lawful power." *Omnia Commercial Co.* v. *United States,* 261 U.S. 502, 510 (1923). This Court has acknowledged that actions by the federal government in aid of navigation may cause damage. However, "damage alone gives courts no power to require compensation where there is not an actual taking of property. Such losses may be compensated by legislative authority, not by force of the Constitution alone." *United States* v. *Willow River Power Co.,* 324 U.S. 499, 510 (1945) (citations omitted). Petitioner was unable to show that the government has taken any action affecting her property. Accordingly, the erosion damage must be considered "indirect and consequential for which no implied obligation on the part of the Government can arise." *Sanguinetti* v. *United States,* 264 U.S. 146, 150 (1924).

[4]All of the work done by the Corps of Engineers in constructing and maintaining the waterway occurred below the mean high-water mark, or upon land owned by the United States or subject to easements acquired by it. *Pitman* v. *United States,* 457 F.2d 975, 976 (Ct. Cl. 1972).

[5]As noted by the court of appeals, petitioner's predecessor conveyed the easement over his property for $1.00 (Pet. App. 12a). In addition, trial testimony showed that the sandy soil along the banks of the AIWW was particularly susceptible to erosion (Tr. 107).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1985

DOJ-1985-07

SUPPLEMENTAL BRIEF

No. 84-1750

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

LOY REE B. MARLOWE BALLAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1750

LOY REE B. MARLOWE BALLAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the Court's request for the views of the United States with respect to the jurisdiction of the court of appeals to hear the appeal in this case.

STATUTE INVOLVED

Section 127(a) of the Federal Courts Improvement Act of 1982, 28 U.S.C. 1295(a), provides in pertinent part:

> The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction —
>
> * * * * *
>
> (2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the

> District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title * * *.

Section 129(a) of the Federal Courts Improvement Act of 1982, 28 U.S.C. 1346(a), provides in pertinent part:

> The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress * * *.

Section 402 of the Federal Courts Improvement Act of 1982, 28 U.S.C. 171 note, provides:

> Unless otherwise specified, the provisions of this Act shall take effect on October 1, 1982.

STATEMENT[1]

In 1982, petitioner brought suit in the United States District Court for the District of South Carolina against the United States and the State of South Carolina seeking money damages. Petitioner asserted that the government's maintenance and use of the Atlantic Intracoastal Waterway

[1]A more complete statement of the case is set forth in the brief in opposition previously filed by the United States.

had caused erosion to her property. In December 1982, the district court awarded petitioner $8,804 in damages.

On January 26, 1983, the United States filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit. On October 23, 1984, a divided panel of the court of appeals reversed the district court's judgment, holding that there had been no showing that the United States had directly and proximately caused the erosion damage to petitioner's property. On March 15, 1985, the court of appeals denied a petition for rehearing. At no point throughout the course of the appeal did any of the parties suggest that the court of appeals lacked jurisdiction to hear the appeal, nor did the court itself raise the issue. The petition for a writ of certiorari, challenging only the merits of the court of appeals' decision, was filed on May 10, 1985.

ARGUMENT

Under Section 127(a) of the Federal Courts Improvement Act of 1982, 28 U.S.C. 1295(a), the United States should have appealed the award of damages against the government to the Federal Circuit rather than to the Fourth Circuit. However, this defect is not by itself sufficient to justify the exercise of this Court's discretionary authority to vacate the judgment of the court of appeals and order the court of appeals to transfer the appeal to the Federal Circuit pursuant to 28 U.S.C. 1631.[2] When the appellants in *Squillacote* v. *United States*, 747 F.2d 432 (7th Cir. 1984), cert. denied, No. 84-1284 (Apr. 15, 1985), made the same error in appealing their case to the Seventh Circuit rather than to the Federal Circuit, the Court denied the government's petition for a writ of certiorari seeking vacation of the court

[2]Under 28 U.S.C. 1631, if a "court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed * * *."

of appeals' judgment so that the appeal could be transferred to the Federal Circuit. In our view, there is no warrant for treating the instant case any differently.

As explained above, the failure of the parties and the court of appeals to notice the jurisdictional issue in this case was wholly inadvertent, and there is no reason to believe that the Fourth Circuit would not reach the correct jurisdictional result in a case in which the issue is raised. Cf. *Portsmouth Redevelopment & Housing Authority* v. *Pierce*, 706 F.2d 471 (4th Cir.), cert. denied, 464 U.S. 960 (1983). Moreover, as set forth in our brief in opposition in this case, the Fourth Circuit's judgment is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, it would not be "in the interest of justice" (28 U.S.C. 1631) to vacate the judgment of the court of appeals only to relitigate the case in the Federal Circuit.[3]

1. Two courts of appeals have considered whether to transfer cases in which the Federal Circuit was vested with appellate jurisdiction by virtue of the Federal Courts Improvement Act. In *Squillacote* v. *United States, supra,* the court of appeals denied the government's request for transfer of the case to the Federal Circuit, concluding that the language of 28 U.S.C. 1631 suggests that transfer of a case should occur "as soon as possible" after the appeal is filed but, in any event, before oral argument and certainly before a decision on the merits. 747 F.2d at 439.

[3]We took the same position in our brief in opposition in *Pacyna* v. *Marsh*, No. 84-1706 (at 4-5 & n.3). In that case, petitioner had improperly invoked the appellate jurisdiction of the Second Circuit. Because that court already had decided the case on the merits, however, the government urged the Court not to exercise its discretionary authority to vacate the judgment. We are furnishing petitioner's counsel with a copy of our brief in opposition in *Pacyna*.

In a subsequent case, however, the Seventh Circuit granted the government's motion to transfer the appeal to the Federal Circuit. *Wronke* v. *Marsh*, 767 F.2d 354 (1985). The court of appeals implicitly recognized that its decision in *Squillacote* had been incorrect. See 767 F.2d at 356. But the court found it unnecessary to revisit *Squillacote*, because that decision "was explicitly limited to the case at hand. The case had been fully argued and decided on the merits before the court discovered the jurisdictional problem * * *. [T]he opinion denying rehearing made it clear that future cases would be transferred to the Federal Circuit before disposition as the statute requires." *Wronke*, 767 F.2d at 356.

In addition to the Seventh Circuit, the District of Columbia Circuit has considered the issue presented here. In *Wilson* v. *Turnage*, 755 F.2d 967 (1985), the court vacated its own prior decision on the merits and transferred the case to the Federal Circuit, concluding that that court had exclusive jurisdiction over the appeal. 755 F.2d at 967. Although the court did transfer the case, it offered a pragmatic suggestion to promote judicial economy (755 F.2d at 967-968):

> Because we transfer this case for procedural reasons only, it may not be necessary for the Federal Circuit to reconsider the merits of our opinion. When cases are transferred between courts of coordinate jurisdiction or different judges of the same court, for example, the prior rulings of the transferor court or judge are generally followed in the interests of judicial economy.

The court of appeals emphasized that when a case has been "fully and fairly litigated," 755 F.2d at 968, both judicial resources and equitable treatment of the litigants would

best be served if the Federal Circuit were to adopt the vacated decision of the District of Columbia Circuit. *Ibid.*[4]

2. At least three courts of appeals have mistakenly heard and decided appeals that properly belonged in the Federal Circuit.[5] In all three cases, however, the error was attributable solely to inadvertence, because neither the parties nor the courts recognized that the recently-enacted Federal Courts Improvement Act vested the Federal Circuit with exclusive jurisdiction. (In *Squillacote*, the error was not noticed until the government filed a petition for rehearing.) With the advent of published decisions such as *Van Drasek* v. *Lehman*, 762 F.2d 1065 (D.C. Cir. 1985), however, it seems evident that such errors are unlikely to recur, as the lower courts and counsel become aware of the new jurisdictional rules.[6] This is particularly so because, by definition, the government is the defendant in all of the cases affected by the Act's new jurisdictional provisions, and the Department of Justice is now thoroughly sensitized to the problem. At all events, it is apparent that the lower courts are not in need of guidance from this Court on the proper interpretation of the Federal Courts Improvement Act, thus making discretionary review by this Court unnecessary.

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[4]In *Professional Managers' Ass'n* v. *United States*, 761 F.2d 740, 745 (D.C. Cir. 1985), the court, in rejecting appellants' arguments against transfer, noted that *Squillacote* differed from the case before the court in that *Squillacote* had already been decided on the merits. See also *Van Drasek* v. *Lehman*, 762 F.2d 1065 (D.C. Cir. 1985).

[5]Those courts are the Seventh Circuit in *Squillacote*, the Second Circuit in *Pacyna*, and the Fourth Circuit in the instant case.

[6]In *Van Drasek*, 762 F.2d at 1068 n.2, the court stated that while it "usually dispose[s] of these cases by unpublished orders transferring the appeals to the Federal Circuit * * *, we issue a published opinion in this case to alert counsel * * * to the impact of the Federal Courts Improvement Act upon our appellate jurisdiction."

In sum, while we believe that our position in *Squillacote* was correct, particularly in light of the subsequent decisions of the District of Columbia Circuit, we submit that vacating the court of appeals' decision would needlessly prolong this case—and, indeed, would serve no practical purpose if the Federal Circuit were to follow the suggestion of the District of Columbia Circuit in *Wilson*, 755 F.2d at 968, to "adopt[] *de facto*" the opinion of the Fourth Circuit. In these circumstances, it is time to bring this case to a close.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1985

DOJ-1985-12

OPINION

SUPREME COURT OF THE UNITED STATES

LOY REE B. MARLOWE BALLAM *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84–1750. Decided January 21, 1986

PER CURIAM.

Certiorari is granted. The judgment is vacated and the case is remanded for the Court of Appeals to transfer the case pursuant to 28 U. S. C. § 1631 to the Court of Appeals for the Federal Circuit. See 28 U. S. C. § 1295(a)(2).

It is so ordered.